SERVED: July 2, 1993

NTSB Order No. EA-3919

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 15th day of June, 1993

GEORGE O. GRANT, Applicant, v. JOSEPH M. DEL BALZO, Acting Administrator, Federal Aviation Administration, Respondent.	)	Docket 148-EAJA-SE-11401

OPINION AND ORDER

Applicant has appealed from the initial decision of Administrative Law Judge Jimmy N. Coffman served December 30, 1992.[1] In that decision, the law judge denied applicant's request, filed pursuant to the Equal Access to Justice Act (EAJA, 5 U.S.C. 504), for attorney's fees and expenses incurred in connection with his defense of an emergency revocation order

[1]A copy of the decision is attached.

issued against him by the Administrator. We deny the appeal.[2]

On appeal, applicant argues, first, that the law judge should not have accepted the Administrator's late-filed answer to the EAJA application.[3] Applicant notes that our rules, at § 826.32(a), require that an answer be filed with 30 days after service of an application, and that failure to file within 30 days "may be treated as a consent to the award requested." That the 30-day deadline is a strict one is confirmed, applicant argues, by rules at § 826.31 and 821.8(h), which provide that documents related to applications be served as are other pleadings, and that the date of service is, in this case, the mailing date. Applicant also argues that Administrator v. Hooper, NTSB Order EA-2781 (1988), requires rejection of the answer.

The law judge found that the answer was late, and so do we. He, however, also concluded that accepting it would not prejudice applicant. We decline to overrule the law judge in this matter. Rule 32 cited by applicant does not compel treating an untimely answer as agreement to an award, and such a result is not logical. Moreover, Hooper does not control, as it applies a good cause test for late filing only to briefs and notices of

[2]The Administrator seeks to file a late reply to applicant's appeal. Applicant objects to this request. We deny the motion, and note that the Administrator fails even to offer an explanation as to why an extension is required.

[3]Mr. Grant's application was dated and mailed June 27, 1992. The certificate of service on the Administrator's answer is dated July 30, 1992.

appeal.[4] Our rules have not been interpreted to require rejection of this answer, and we decline to find that the law judge erred in applying a prejudice standard and accepting it.[5]

Turning to the merits, resolving applicant's appeal requires a review of events in this proceeding. In our decision on remand, NTSB Order EA-3577 (1992), we dismissed the Administrator's order because he had failed to prove an essential element of his complaint: that the involved aircraft had a U.S. airworthiness certificate so as to invoke applicability of the 14 C.F.R. Part 43 regulations applicant was charged with violating.[6] We also rejected arguments by the Administrator: 1) that an airworthiness certificate should, for various reasons, be assumed; 2) that various evidence already in the record proved the applicability of Part 43; or 3) that another Part 43 rule should be interpreted in a way that would eliminate the need for proof here.

On appeal, applicant argues that, in failing to make even a

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[4]We stated in Hooper (slip op. at 3-4) that, absent a showing of good cause, we would dismiss "all appeals in which timely notices of appeal, timely appeal briefs or timely extension requests to submit those documents [i.e., notices of appeal and appeal briefs] have not been filed."

[5]The Administrator notes, in his motion to late-file (see note 2), that the Board has in the past looked at whether the other party would be prejudiced in deciding whether to accept late-filed replies. See, e.g., Administrator v. Kelso, 5 NTSB 400 (1985).

[6]See id. at note 7. Rule 43.1, Applicability, provides in part that Part 43 governs maintenance, preventive maintenance, rebuilding, and alteration of any aircraft having a U.S. airworthiness certificate.

prima facie showing that the aircraft was covered by a U.S. airworthiness certificate, the Administrator failed to act with substantial justification at any stage of the proceeding. Despite counsel's failure at the hearing to elucidate reasons for that belief, it was not unreasonable, in the face of other information, for the Administrator to believe that the aircraft had a U.S. airworthiness certificate.

Whether the Administrator was substantially justified is a considerably different question from whether he met his burden of proof. Application of US Jet, NTSB Order EA-3817 (1993). And, dicta in our decision on remand about applicability of the original airworthiness certificate to a substantially rebuilt aircraft do not control our decision here on whether the Administrator was substantially justified. Further, we note the consistency of the law judge's conclusion with the ability of the Administrator to argue new legal theories, provided they have some reasonable basis. See, e.g., Catskill Airways, Inc., 4 NTSB 799 (1983); and S. Rep. No. 96-253, 96th Cong., 1st Sess., at 7 and H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. at 11 (the government may advance "in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts.").[7]

[7]The law judge held (initial decision at 7):

> While the Administrator failed to prove the aircraft had a U.S. airworthiness certificate, his argument that such certification either could be inferred or was not required by the statute was not unreasonable . . . . Just as a dismissal does not prove the Administrator's case

Counsel for the Administrator stated that failure of the necessary proof was an oversight, and sought to reopen the record to offer that proof (Tr. at 118). In fact, certain evidence was already available. In the record, as part of Exhibit C-4, are parts of the aircraft log, including Cessna's notation that a Standard Airworthiness Certificate had been issued in 1977. It is immaterial to our EAJA inquiry that the parties agreed that this information would not be considered in the law judge's decision on the merits of the revocation order.

Furthermore, the Administrator knew that applicant intended to rebuild the aircraft (confirmed, for example, by Exhibit C-1, the purchaser's letter), rather than change it materially. This intent was also demonstrated, for example, by log entries announcing compliance with various Airworthiness Directives for the aircraft. This information was sufficient to originate and sustain a reasonable belief that the aircraft had been issued a U.S. airworthiness certificate (in 1977) and that it continued to have that airworthiness certificate.

Applicant also relies on Administrator v. Moore, 3 NTSB 182 (1984) and Phillips v. Busey, NTSB Order EA-3125 (1990), to support his notion that the Administrator could not have been

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unjustified, the rejection of a legal argument does not prove it unreasonable. Given that the Board had not previously ruled on this specific issue before, the Administrator's theory had a reasonable basis in law, both when he issued the revocation order and when he appealed the ALJ'S dismissal.

substantially justified because he failed to prove an essential element of his complaint. These cases, however, are not on point. In Moore, the Administrator purposely decided not to offer evidence, but instead to proceed on a legal theory that was subsequently rejected. This is considerably different from the instant case, where the failure was solely due to inexperience of counsel, not lack of justification for prosecution. In Phillips, the Administrator was found to have access to, yet failed to use, information that would have raised considerable doubt about his ability to prove alleged record falsifications. There is no indication, akin to Phillips, that here the Administrator had available to him information that would have made a reasonable man withdraw the complaint or investigate further.[8]

Finally, we must comment on applicant's suggestion that a lack of substantial justification on this one aspect of the proof that was needed under the Administrator's order of revocation would warrant granting the EAJA application in full. Applicant loses sight of the fact that the law judge found the Administrator had made a prima facie case for the substance of the complaint: that applicant had intentionally falsified the aircraft records (§ 43.12) and that he had reported work when the

[8]Indeed, although applicant contended that his Answer to the complaint had denied the applicability of Part 43, thus putting the Administrator on notice, applicant's answer, which simply denied the allegation that the records were required to be kept to comply with Part 43, need not be read to convey this particular message or to give the Administrator any serious reason to question continued pursuit of the complaint.

work was not done using accepted methods, techniques and practices (§ 43.2(a)). Applicant does not allege that the Administrator was not substantially justified in believing that applicant had done these things. Thus, even were we to find that the Administrator was not substantially justified regarding the airworthiness certificate issue, it has not been established that applicant would be entitled to all fees and expenses.[9]

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion for leave to file a late reply is denied; and

2. Respondent's appeal is denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[9]Indeed, applicant does not indicate what, if any, amount of time was dedicated to his preparation of a defense on the applicability of Part 43.